UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
------------------------------x
WILLIAM HENIG, on behalf of himself and others similarly situated

Plaintiffs

v. 13 CV 1432 (RA)

QUINN EMANUEL URQUHART & SULLIVAN LLP et al.

Defendants

------------------------------x

New York, N.Y.
October 29 2015
3:00 p.m.

Before:

HON. RONNIE ABRAMS

District Judge

APPEARANCES

JOSEPH & KIRSCHENBAUM LLP
Attorneys for Plaintiff
DAMON KIRSCHENBAUM
DENISE A. SCHULMAN

QUINN EMANUEL URQUHART & SULLIVAN LLP
Attorneys for Defendant Quinn Emanuel
MARC L. GREENWALD
SAMUEL C. KITCHENS

BRYAN CAVE LLP
Attorneys for Defendant Providus NY
DANIEL M. O'KEEFE

-also present-

JEFFREY W. JACOBS, DTIGLOBAL.COM

(In open court; case called)

THE DEPUTY CLERK: Counsel, state your names for the record.

MR. KIRSCHENBAUM: Marvin Kirschenbaum for Plaintiff Henig.

MS. SCHULMAN: Denise Schulman for plaintiff. Good afternoon.

MR. GREENWALD: Mark Greenwald and Samuel Kitchens for Quinn Emanuel. Good afternoon.

THE COURT: Good afternoon.

MR. O'KEEFE: Daniel O'Keefe with Jeffrey Jacobs on behalf of defendant Providus. Good afternoon.

THE COURT: Good afternoon, everyone. I am going to ask you to all speak into the microphone today. It is difficult to hear in this courtroom. And I will do the same.

We are here for oral argument for defendant's motion on summary judgment. Before the argument, I want to discuss a few initial matters. First, Quinn Emanuel requests that the papers filed in connection with this motion be filed in redacted form and that the courtroom be sealed for this argument. Quinn makes these requests based on the presence of documents and information related to the summary judgment motion that are protected by the attorney-client privilege and work product doctrine.

In short, the requests to prevent the public from accessing the courtroom for this argument is denied. I am willing to allow the parties to file papers in redacted form but only with significantly fewer redactions than Quinn has proposed. I will first discuss the requests to redact the summary judgment filings.

As a preliminary matter, I agree with Quinn. Personal information such as phone numbers, home addresses, and email addresses are not relevant to plaintiff's claims, and may be redacted in the interest of privacy.

Turning to the substance of the request: As I indicated in my July 18, 2014 order relating to redactions in plaintiff's second amended complaint, judicial documents submitted in connection with the summary judgment motion are subject to a strong presumption of public access under the Second Circuit's *Lugosch* case. That's 435 F. 3d at 121.

While the law is clear that the attorney-client privilege and the doctrine of work product can overcome that presumption, they cannot do so in all circumstances. Because the public is entitled to understand the nature of the dispute and the reasons for the rulings of the Court, information that might otherwise be confidential can be made a part of the public record of a case when it relates to the very subject matter of the litigation. That's from the *Sanchez v. MTV Networks* case, also from the Second Circuit 525 F. App'x at 7. Put another way, the First Amendment interest to the public counsels in favor of disclosure of information that would otherwise be confidential when that information relates directly to the issue on which the Court is asked to rule.

Applying these principles, I will allow some redactions to parties' summary judgment filings, but those redactions, as I said, must be significantly more narrowly tailored than the redactions proposed. Specifically, the identity of Quinn's client may be redacted along with any substantive information relating to the underlying litigation for which plaintiff was hired in connection with the document review at issue. The parties may also redact other information that could be used to identify the client or the underlying litigation. Documents containing this type of information are protected either by the attorney-client privilege or the work product doctrine. In any event, this information is largely irrelevant to plaintiff's claims which relate to the scope of his specific job duties while working on the document review. Information about the document review's protocols and the written and verbal instructions plaintiff received, however, are the very subject of this litigation. As such, I find that the First Amendment interest in ensuring that the public understands this dispute outweighs the interest in maintaining the confidentiality of this information.

Further supporting this conclusion is the fact that the documents containing information related to the document review's protocols are largely, if not entirely, protected by the work product doctrine rather than the attorney-client privilege. The work product doctrine provides only a qualified confidentiality that can be overcome in certain circumstances as described in Rule 26(b)(3). The need to ensure the confidentiality of this information is therefore somewhat reduced, while the First Amendment interest in disclosure is at the highest order given how central the information is to resolve the defendant's summary judgment motion.

Consistent with this ruling, I would like the parties to submit revised redaction requests to the Court by the end of business tomorrow if they are able to do so. If not, they are to submit a request for an extension, but it should be brief because I want the redacted versions of all the summary judgment papers on the docket as soon as possible.

Lastly, I refuse to seal the courtroom and thereby prevent the public from accessing this argument as was requested by Quinn. Second Circuit law requires that for a civil courtroom proceeding to be closed to the public, (1) the party seeking closure must advance an overriding interest that is likely to be prejudiced; (2) the closure must be no broader than necessary to protect that interest; (3) the Court must consider reasonable alternatives to closure; and (4) the Court must make findings adequate to support the closure. See the *New York Civil Liberties Union case v. The New York City*

Transit Authority, 684 F.3d at 304. More specifically, the Second Circuit concluded in the *Newsday v. County of Nassau* case that even when a proceeding requires a court to consider confidential facts, the court may structure such a proceeding to minimize the likelihood of disclosure in order to ensure that the public's right of access is not infringed. That's 730 F.3d at 166.

As I have already discussed, the only information that I can conclude overcomes the First Amendment presumption in favor to public access relates to the identity of Quinn's client and the substance of the litigation that necessitated the document review on which plaintiff worked. Rather than sealing the courtroom to protect this interest, the parties can simply refrain from discussing those issues on the record. If absolutely necessary, a side bar can be requested, but I don't anticipate the need for that.

With that, it is defendant's motion and I'm happy to hear from you first, Mr. Greenwald.

MR. GREENWALD: Thank you, your Honor.

As the Court ruled on the motion to dismiss, and as the parties have agreed, the test for whether the plaintiff was in fact practicing law is whether he was rendering legal advice to a particular client, whether he held himself out as an attorney, and whether the duties required him to draw on legal knowledge and judgment. The parties have agreed in the briefing that that is the appropriate test following the *Lola* decision under New York law.

THE COURT: Let me just ask, do you agree that the standard is the same under New York law as it is under FLSA?

MR. GREENWALD: We do, your Honor. We see no distinction and no need to draw any choice of law analysis; that that is the standard that governs New York law and should govern this case. We believe that plaintiff concedes that his conduct meets the first two elements of that test; that he was rendering legal advice to his and Quinn Emanuel's client in this case; that he held himself out as an attorney both when he was hired as well as to the client and was billed as an attorney on the bills. So those facts are established and undisputed.

So plaintiff is relying solely on the third prong saying that his conduct doesn't meet that third prong and therefore he wasn't practicing law. But the question is whether his duties that he was hired for required him to draw legal knowledge and judgment. I think the *Lola* court talked about some judgment as the key element for the question here. The facts establish beyond any doubt that the job that Mr. Henig was hired for required him to exercise legal knowledge and legal judgment.

There is really no dispute as to what he was required to do. The statement of undisputed facts, they have admitted fact after fact after fact about what he was required to do. The key document is Exhibit Q to Mr. Kitchen's declaration which were the instructions of PowerPoint that were delivered to him. And contrary to what he pled in the complaint and contrary to the evidence he is proposing now, that makes very clear that he was not meant to just look for search terms and mechanistically, like a machine, apply, find the terms and put it into a category based on terms, but that he was meant to use legal judgment and he was meant to use his discretion and legal knowledge.

THE COURT: How do you respond to his arguments regarding verbal instruction that he claims that he received and whether they contradict in some fashion with Exhibit Q and the PowerPoint?

MR. GREENWALD: I don't believe that the record even shows that he received verbal instructions that contradict Exhibit Q. In his declaration, which the Court under Second Circuit precedent is entitled to ignore as a last minute declaration that contradicts his sworn testimony at deposition, but it doesn't even say that it contradicts. Basically, he's claiming that he didn't understand the instructions and therefore didn't follow them and generally heard -- doesn't report exactly who told him what, what he was told -- just generally understood he should just mark things responsive or not responsive.

If you look carefully at what his declaration is, there is no way to establish what oral instructions he got or who he got them from. What we do have are his repeated admissions. I would direct the Court first to paragraph 116 of the statement of undisputed facts where they admit that Mr. Henig was aware he was supposed to follow instructions. I would further refer the Court to paragraph 114 which shows he was following instructions.

Paragraph 114 says, on three different occasions Mr. Henig included comments regarding the potentially privileged nature of the documents he reviewed. And Mr. Henig admits that he did that. It shows that he wasn't doing what he's claiming, sort of claiming in his declaration, but that he actually was practicing law. He was making judgment calls. On three occasions he did so and admits he did so. There is no way to square this admission with the notion that he wasn't practicing law.

THE COURT: The language that you are referring to is that plaintiff admits that he was aware that he was supposed to follow the instructions he was given regarding responsiveness, privilege and coding.

MR. GREENWALD: Yes, your Honor. So that admission followed by his actual conduct that he admits in paragraph 114, and again paragraph 121, he says that if he had questions concerning how to categorize particular documents, he would ask questions of the second-level reviewers. That means that he was exercising judgment. To have questions means you have to exercise a judgment. And he would ask: Is this responsive or not responsive? That means he needs to understand, he is trying to understand the context. And that demonstrates that what he was actually doing, besides the instruction that clearly asked him to practice law, was to exercise legal judgment.

And then paragraph 123 is the evidence that at the end when he goes to apply for another job, he categorizes this as legal experience because that's what it was. It was legal experience that he was engaged in.

So whether the defenses they're proffering in their brief now, one, that it was human judgment, not legal judgment. First of all, that admission takes it right out of the *Lola* case where the Court only allowed the case to go forward because Mr. Lola had pled that he was asked to do something that a machine could do. So already we are outside the *Lola*. The *Lola* court would say if you're exercising judgment, that is not something a machine does. That would be the practice of law.

Then we've also cited in our reply brief the multiple ABA opinions that when a lawyer -- and Mr. Henig is a licensed lawyer who applied for a job knowing that was a requirement -- is exercising judgment, is doing a task, that will be considered the practice of law even if it also could be considered something else like accounting, because any time a lawyer is doing anything close to the area of legal work, the ABA says that would be considered by the client to be practicing law, and you need to follow the rules for practicing law.

Finally, that also shows this is not a factual dispute. This is similar to what the KPMG Second Circuit Court said. This is about how we interpret what happened, what's the implication of it. So the Circuit said regarding -- this is *Pippins v. KPMG* 759 F. 3d 235: The various arguments we have considered and rejected do not present issues of facts. They are not arguments about what plaintiffs do but about how what they do should be characterized in light of established legal criteria.

The only dispute he is raising is how his work should be categorized. They don't dispute the work he was asked to do and they don't really dispute the facts about what he did.

Another defense they proffer is about the fact that two of the second-level reviewers had graduated from law school but hadn't passed the bar yet. That is simply irrelevant to the dispute before the Court today. The question before the Court today is: Was Mr. Henig practicing law when he was engaged in the document review: There is nothing about those two individuals that changed the analysis for what Mr. Henig was doing.

THE COURT: What specific legal knowledge do you think he needed to do this job?

MR. GREENWALD: What --

THE COURT: What legal knowledge did Mr. Henig have or need to do this job?

MR. GREENWALD: Well, I think the first key legal knowledge would be attorney-client privilege, your Honor. The attorney-client privilege is a complicated area. Every law student has to take a professional responsibility class that deals with the nuance of attorney-client privilege and, for instance, as your Honor just referred to, there's a difference between work product and attorney-client privilege that a lay person simply would be unfamiliar with. But that was crucial and described in Exhibit Q. Those kinds of distinctions are important, and that is why the client demanded that licensed lawyers, people who have graduated from law school, passed the bar, be the only people considered for the first-level review.

So, the next argument is that Quinn Emanuel set the guidelines and that Mr. Henig didn't participate in setting the guidelines. He didn't do the responses and objections to the requests for production. He didn't develop Exhibit Q. And we concede that. He wasn't up there with the associates and the partners doing that part of the case. But that is exactly the *Pippins* case from the Second Circuit where the Circuit described the junior accountants, that is precisely the role expected of audit associates, performance of tasks which may be significantly predetermined but with the perpetual diligence founded in specialized knowledge that can compel and form deviation from such guidelines. That is what first-level reviewers were supposed to do, and the evidence is undisputed that that is what Mr. Henig was doing.

The final defense they proffer is he couldn't exercise legal judgment because he simply didn't understand the instructions. Now, the undisputed facts we submit rebut that; that he marked the document key; that he marked some of these documents as "I can't determine whether or not they're privileged." So it seems he did understand and he admits that he engaged in that.

There is a small number of documents he marked that way, but he only worked on this project for fewer than eight weeks, and it was during the Jewish holidays and he wouldn't have been working on Jewish holidays. He just didn't work that many days. So, it's true he didn't get much feedback, but he hardly worked long enough to receive the kind of feedback that actually happened, and it's shown that there was feedback from Mr. Kutscher and the other Quinn Emanuel lawyers.

THE COURT: Can I ask you one factual question? Is there a way to tell from the record how many of the documents he tagged as unresponsive were not reviewed by anyone else?

MR. GREENWALD: There is no way to tell from the record before the Court. My understanding is, there would have been a way -- we can track every document that Mr. Henig reviewed, and we can track what happened to that document, whether it went into "it was never reviewed" or it was pulled into the sample that was QC'd by the second-level review team, but that would require a by-hand process to follow each document. There is no way for the system to run that information, is my understanding.

THE COURT: I just want to confirm that it is clear that documents he tagged as non-responsive are ones that would not be reviewed by others. Is that right?

MR. GREENWALD: That is correct. There is a quality control process that a sample of documents marked non-responsive would be pulled from various reviewers to make sure that they were -- that what they were marking non-responsive were non-responsive.

THE COURT: That is sort of a random quality control sampling.

MR. GREENWALD: Yes, your Honor. So there are documents that Mr. Henig would have reviewed marked non-responsive that no one else would have looked at and would not have been produced in the litigation.

So, based on all of that, we submit the evidence is uncontradicted, he did not -- he was exercising legal judgment.

There is no dispute. And he was practicing law. Unless the Court has any other questions --

THE COURT: No, thank you.

MR. KIRSCHENBAUM: Your Honor, would it be all right if I spoke from here?

THE COURT: As long as you speak from the microphone, it's fine.

MR. KIRSCHENBAUM: I agree with the fact that plaintiff accepts the three-part test that your Honor set forth.

With respect to the first two factors, did he render legal advice or did he hold himself out as a lawyer, is not so much that we agree that he satisfied those as we just don't think that they're very instructive here. It's not as if plaintiff is being accused of unauthorized practive of law here where the question would be did he tell a lay person that he was an attorney and then we have to try and figure that out. We think that the pivotal question here is, as the defendants did and as the Court said in *Lola* New York, is one of the states where some legal judgment is an essential element of the practice of law.

THE COURT: So just to be clear, if I find that he was exercising legal judgment, you would agree that you would lose?

MR. KIRSCHENBAUM: Yes, your Honor.

THE COURT: Do you also agree that the law is the same under the FLSA and the New York Labor Law because we're looking at New York law with respect to whether he was practicing law. Is that right?

MR. KIRSCHENBAUM: I understand the New York law to incorporate the FLSA exemption practice. There may be some plaintiffs lawyers out that there that don't like that.

THE COURT: I think they do. I just want to confirm that.

MR. KIRSCHENBAUM: In the *Lola* case, the Circuit Court found that the allegations did in fact support a claim that plaintiff was not exempt under the FLSA. Unlike the way plaintiffs misrepresented the allegation of their complaint, the complaint did not plead that plaintiff did work a machine could do. The complaint pled, as the Court in *Lola* itself said, that plaintiff alleged that he worked under such tight constraints that he exercised no legal judgment whatsoever and that he used criteria developed by others to simply sort documents into different categories. That is a quote from *Lola*, and that is precisely -- it's two pieces, not directly. That is precisely what plaintiff alleges he did here.

Plaintiff does not need to prove his case today. He just needs to establish that he sets forth a credible claim that his day-to-day activities did not constitute the practice of law. Given that the FLSA exemptions when it revolves around job duties for such a fact intensive question, courts generally do not decide these issues on summary judgment.

Mr. Henig testified with respect to his duties. He was transferred about two and a half hours, and he was told what to do, and then he started working later that day. What he was told to do was look for search terms mark, documents responsive if they were there, and if they were not there, that was pretty much the only criteria that would allow him to mark a document as non-responsive then he was to mark it non-responsive.

THE COURT: He had to make privilege calls, right? How do you make privilege calls without using legal judgment or knowledge?

MR. KIRSCHENBAUM: Mr. Greenwald peppered my client on precisely this issue at the deposition. Mr. Henig was specifically told that if the document was from people on list A, it was a communication between people on these two lists, players and attorneys, then it was a privileged document. And if it included someone outside that of set, then it was not privileged. That's not a privileged call. That's a privilege call already made by the time plaintiff is reviewing the documents.

THE COURT: There are three examples where he puts comments down. There's one where he says: "it looks like this could be AC but not sure the source."

Second comment, "Looks like it may be AC, not a hundred percent sure."

On the third, "Possibly AC privileged."

How is he not using legal judgment in thinking about those things?

MR. KIRSCHENBAUM: Literally --

THE COURT: Even if he doesn't know the answer.

MR. KIRSCHENBAUM: Your Honor, I think actually it reinforces that for him the only time he could make the privilege call was when he knew the source of the email or communication and the recipient. When he was not sure of the source, he flagged it because he simply didn't know. He could not make the judgment call. He couldn't read the document. He couldn't analyze the document. He couldn't look at the content of the document or figure out who the recipient was. Simply, because he was not sure of the source, he had to mark it "I cannot tell." That is precisely the opposite of exercising judgment.

THE COURT: In every situation where did he not find that there was attorney-client privilege or work product or some other tag that he's putting on, you know, non-responsive for example, he is making a determination, right, that those privileges don't apply or that that tag is inappropriate?

MR. KIRSCHENBAUM: Your Honor, I don't want to use a silly extreme example, but say, for example, I go and order a beer at Madison Square Garden and someone asks me for my ID.

It can't be said that person is making a legal determination as to whether I am legally allowed to purchase alcohol. But I think that sort of misconstrues the kind of legal determination we're talking about.

The actual determination was documents that contain these search terms are responsive. For your purposes, Mr. Henig, documents that do not contain these search terms are not responsive. Mr. Henig simply determined were the search terms there, and do I mark them responsive accordingly or were they not there and do I mark them non-responsive?

If that type of determination was considered a legal determination, then the Second Circuit's finding that categorizing -- that simply sorting documents into different categories based on criteria developed by others, the Second Circuit clearly acknowledges that that type of work could sufficiently be considered not the practice of law.

THE COURT: Well let's look at two other examples. One, he tagged a document key, and his explanation was "it appeared to be from a head honcho who's pissed and therefore required further review and didn't seem like something that should be buried" would a computer respond that way?

MR. KIRSCHENBAUM: No, your Honor, and I don't think that Mr. Henig was doing work that a computer could do. I don't think that that is the question. I think the question was, what the Second Circuit says it is, which is was he using criteria developed by others to simply sort documents into different categories. And the answer to that question is yes. I understand that one out of 13,000 documents he claims that he winged it.

THE COURT: But in every other one of those examples, he's not writing something down. So there is a thought process, you would agree with me, you may say it is human judgment as opposed to legal judgment, but you agree that there is a thought process involved in this analysis, right?

MR. KIRSCHENBAUM: I think he was engaged in precisely the thought process as the Second Circuit says can be found cannot be the practice of law, which is -- I don't want to keep repeating it but using the criteria developed by others to sort documents into categories. Everything in the world has a thought process.

THE COURT: If this were a first-year associate or second-year associate and they had gotten guidance from the partners above them or senior associates who had been doing document review for years before that and said this is how you go about it, this is what I think strategically is the best way of looking at it, so here is the guidance how to do it, would you say they weren't practicing law, the junior associates.

MR. KIRSCHENBAUM: Wouldn't it be a lot harder to parse an individual's -- an individual who is employed for a wide variety of tasks to look at him I think during only one minute of the day and say was he practicing law during that one minute? Surely, you know, in order to come to this oral argument I had to walk to court. Are you saying walking to court is the practice of law? No, it may or may not be if a first-year associate is doing something which is on the border, but he's a first-year associate that also can be called upon at any time to draft a legal memo, interview a client, make a real determination with respect to privilege and responsiveness which second level reviewers did in fact do in this case. Then I think it would be considered the practice of law but that's not --

THE COURT: I think we both agree that there are tasks you do even as a very senior lawyer, whether it's walking to court or stapling or Xeroxing, and yet no one would say that person wasn't practicing law. I agree with you there. My question is if you had a first-year associate who every day was, let's say, that had a document review where there were no contract attorneys but an associate who had passed the bar, whether it's a first year, second year or third year who is doing sort of the first-level review, are they not practicing law?

MR. KIRSCHENBAUM: I think that the question would be if that is the entire universe of that individual's job duties. I have never worked at a big firm. I don't think first-year associates are hired with the understanding that they will be doing the kinds of work Mr. Henig did for the entirety of their employment or even for an entire block of time.

THE COURT: It doesn't matter if it's the entirety of his employment. He only worked for six weeks, right?

MR. KIRSCHENBAUM: If I ever represented a first-year associate, I could parse it to that level of minutiae, but we are not at that point. This is Mr. Henig. Mr. Henig was discreetly hired for only this; nothing more. Never to turn into anything more. And not on some kind of level where he was -- he wasn't screened for anything more. He wasn't trained for anything more. There was no evaluation of his talents with respect to anything more.

THE COURT: But he got hired because he was an attorney, right? And he was part of the team that was rendering legal advice, and he had to make judgment calls. Even if he was at the lowest level, he was still part of a team that was providing legal advice, and he had to make judgment calls in his job on how to do -- you may say that his task was far from glamorous. You may say it's not what he wants to do in the future, but that is not really the question. The question is was he practicing law in make judgment calls including ones about a legal doctrine, such as the attorney-client privilege.

MR. KIRSCHENBAUM: And I don't think that the judgment calls he was making are calls that required -- they necessarily did not require legal knowledge. In fact, like the quote that Mr. Greenwald just read us from *Pippins*, he was not allowed to deviate from the guidelines. He was told exactly what to do. And the call that your Honor is talking about is he had to decide if a search term was there. He had to decide the sender and recipients of emails. What your Honor is identifying is precisely the call that that the Second Circuit states should not in and of itself be considered the practice of law. That is the way I read the *Lola* decision.

THE COURT: But he still has to make the decision about whether documents are responsive, whether they fit into particular subcategories, which I won't get into, whether a document is a key document, whether it's interesting, whether it's confidential, whether it's privileged, and as well as other decisions, right?

MR. KIRSCHENBAUM: Not according to his testimony, your Honor. According to his testimony, his job was to mark documents responsive or not responsive and privileged and not privileged. It's interesting because your Honor's citation to Exhibit Q -- if we take a look, I think that the most illustrative part of Exhibit Q would be page 21 on Exhibit Q where there are issues of subtags which defendants at various points state defendants had to look at these documents to sort of identify the issues.

Then if we take a look at Exhibit T, which is another set of documents that defendants are relying on, it states on page 4 issue tagging for second-level review as follows, and then describes the issue tags on page 5.

Similarly, if we take a look at Plaintiff's Exhibit 13, there are individuals that sat at the same oral training presentation that Mr. Henig sat at, or not at that actual one but a similar one, that wrote notes on their paperwork for varying parts of this document saying for a second-level review only.

So I don't think that the big list of stuff that is alleged plaintiff had to do in the written materials is in fact what plaintiff had to do. I think what plaintiff had to do is precisely what he said he had to do, which is what the *Lola* case describes as supporting a finding of not the practice of law, which is using their criteria to sort documents into different categories.

THE COURT: You referenced Exhibit Q. Look at page 26. It says, among other things: While we are relying on privileged search terms, they are not going to capture every privileged document. Do not assume that because a document lacks a privileged search term it is not privileged. This summary is no substitute for questions. If you have any questions, ask them. Privilege can be tricky and there are a lot of grey areas, so chances are if you have a question, someone else does too.

I mean, this is saying don't just rely on search terms, use your judgment, use your legal judgment about a legal doctrine. No?

MR. KIRSCHENBAUM: Just like with respect to the issue of tagging that we spoke about on page 21 of Exhibit Q, plaintiff did not draft these and plaintiff did not wholeheartedly endorse these as what his actual job duties are. In fact, in paragraph --

THE COURT: But can't you be low level at a law firm, and can't someone else tell what you to do and you have to do it?

MR. KIRSCHENBAUM: Sure.

THE COURT: But you're still acting as a lawyer and part of a legal team?

MR. KIRSCHENBAUM: And that's precisely why we were a little confused by defendants relying on *Pippins*. We're not saying the fact that somebody told plaintiff what to do or the fact that somebody reviewed plaintiff's work is what means that plaintiff did not exercise legal judgment. What we're saying is the specific thing that -- it depends what the person is telling you to do. And if the person is telling to you exercise legal judgment, then simply the fact that someone is telling you to do it doesn't change the fact you are exercising legal judgment.

But if what the person is telling you to do is to use criteria to locate search terms and categorize documents, then you are not, according to the Second Circuit, engaged in the practice of law.

THE COURT: That is not the quote I just read. The quote I just read specifically said that while we're relying on privileged search terms, they're not going to capture every privileged document.

MR. KIRSCHENBAUM: And plaintiff consistently denied that that was his oral instruction. Plaintiff testified --

THE COURT: But he got these written instructions. There is no doubt about that.

MR. KIRSCHENBAUM: He got the written instructions, but they were not presented to him as instructions. He had an oral presentation. There were written documents, a pile of them. He wasn't allowed to take them home. He wasn't given time to read them. He reviewed documents the very same day, your Honor.

THE COURT: Did he say, you know what? You haven't given me enough time to make sure that I understand what my task is. There's a difference between not practicing law and practicing law badly, right?

MR. KIRSCHENBAUM: No, he was told what to do and it was not to read these instructions and listen to them. It was to categorize documents exactly the way he was told to categorize documents at his training session. And that is not at all times consistent with the written job description.

Judge Oetken put it pretty clearly in the *Indergit* case.

"Even where an employee's job description appears to exempt him from eligibility for FLSA overtime pay, if that employee's actual duties vary from the seemingly exempt description, such that they are engaged primarily in rote, manual, and nondiscretionary tasks, he would be misclassified, despite the exempt nature of his job description."

Why is this given any more credit than every other job description where a defendant might write what their end goal is, what they might like to see done, but when it comes down to the day-to-day activity, it's very clear what the plaintiff was engaged in was manual, rote work.

THE COURT: Can you spell the case out for the record please?

MR. KIRSCHENBAUM: Yes. I-N-D-E-R-G-I-T.

THE COURT: Isn't there a difference between a job description generally. Let's say you're hired to be an associate, but then you get there and all you're doing all day long is working in the mail room. I think we'd agree you aren't practicing law, right? But here --

MR. KIRSCHENBAUM: I don't know --

THE COURT: I think, Mr. Greenwald, if you are just starting now.

MR. GREENWALD: We would concede, your Honor.

THE COURT: Good. Here his job was to review documents and in connection with that job that he only had for six weeks he was given instructions, maybe perhaps, among others, perhaps among the oral instructions he was given written instructions that as I just read indicate that he should use search terms but you also have to use more than search terms. In fact, then -- and this is exhibit X -- emails were sent to the first-level review team. I am reading again from Exhibit X. It says it's from an associate.

It says, "I hope that everyone had a good long weekend. I want to talk for a second about privileged documents. Up until now the instruction had been that if there was a whiff of privilege, you should mark it privileged. That's still generally holds. However, if you see a note that privilege has been broken, you may now refrain from tagging it privileged."

Then there's a follow-up to that that says: "Of course, if you aren't comfortable making this type of determination or if you feel it requires nuance, then tag the document privileged. But if you see the email went outside of blank and blank or their attorneys and consultants and are sure that privilege is broken, then you can skip the privilege tag." This is telling people to think. And if they can't make a decision, then they should err on tagging it privileged. And so this is sort of telling them again to use judgment, isn't it?

MR. KIRSCHENBAUM: OK. So there's two things in that question. One of them was about the written instructions. Another one was about this email.

THE COURT: I'm sorry. Let's break it down.

MR. KIRSCHENBAUM: OK.

THE COURT: I'll let you respond to each one.

MR. KIRSCHENBAUM: If I had taken a job -- in Judge Oetken's case or in any case like that, if I take a job description and crossed out the word "description" and write the word "instruction," does that change the analysis? I don't think so. I think the question is simply if an employee in his day-to-day work is -- it is made clear to him that these are the instructions this is how you are to perform your job, there is an understanding that a jury should decide what the individual was actually doing instead of simply looking to the documents and assuming that that is what the individual was in fact expected to do.

Moving over to the email, I think this is the email that Mr. Greenwald confronted Mr. Henig with at his deposition, and Mr. Henig made it very clear that the only instruction he was given with respect to privilege being broken was if there is an individual on the chain who is not a team member. Now, sure, there could be a question if an individual -- with respect to an email address of where it came from. But short of that, there is not a legal judgment question the way that the parameters were given to Mr. Henig, from a lawyer to a client, from a client to a lawyer, privileged. Anyone on the chain who is not a lawyer, not privileged.

This analysis that an individual may have had to conduct in response to Mr. Kutscher's email is simply not a legal analysis. Do you know if that individual was a lawyer or was a key member or not? The lists were extremely expansive, and it could be that even within the very specific guidelines, even applying the guidelines as rote as they are, for example, in the 13,000 documents or 12,900 and whatever documents that plaintiff reviewed, there were three times where he just couldn't identify the source or couldn't even apply those rote rules. Then at that point he did not exercise a discretion. All he did was flag it so that the second-level reviewer could in fact engage in a legal analysis.

THE COURT: Anything else?

MR. KIRSCHENBAUM: I think I covered most of my points, your Honor.

The only thing I wanted to point out is that I think there is a world of corroborating circumstances here that lends credibility to plaintiff's story and shouldn't be thrown out wholesale the way the defendants wanted to on the basis of the written materials. This was an extremely complicated discovery project that plaintiff was working on. There were millions of documents. [redacted]

THE COURT: Let's not talk about the underlying case, and if there is a request, I'm happy to redact portions that refer that suggest which case it is.

MR. KIRSCHENBAUM: My apologies, your Honor.

The instructions themselves as written are simply too complicated. It's not that plaintiff is saying, "These were my instructions, and I didn't understand them so I did whatever I wanted."

What plaintiff is saying is: "I was given very specific instructions. The thing that defendants are calling my instructions (A) were not instructions that were given. I was not told to follow them. And to corroborate that, take a look at the instructions. It simply makes no sense that those instructions are what I would have been told to do given the underlying circumstances of this litigation."

So at the core of it, I think plaintiff tells a very consistent story. He says what his instructions were, which is not the written instructions. I think he is entitled to his day in court.

THE COURT: Thank you very much.

Any response?

MR. GREENWALD: Just very briefly, your Honor.

The question before the Court is what job was he required to do. These were not job descriptions. These were contemporaneous instructions for how to do the job. Plaintiff admits in paragraph 119 he followed the instructions to the best of his ability.

Besides Exhibit Q, I would direct the Court to Exhibit R, which was sent to the first-level reviewers on October 1. And on section four, privilege, the first bullet, first sentence: "Use discretion marking documents privileged." Those were the instructions that all the first-level reviewers, including plaintiff, was given. Those instructions mean that the first-level reviewers were practicing law, and in doing so the *Lola* Court -- the *Lola* Court's holding was a fair reading of the complaint, and the light most favorable to *Lola* is that he provided services that a machine could have provided.

That's what the Second Circuit said. And that's why they did not dismiss or they reversed Judge Sullivan's dismissal. But here these are not services a machine could have provided. They have conceded that. And maybe there is a law someplace else, like in France, where if you get a job and do it poorly, you get paid more, but the Fair Labor Standards Act doesn't mean you can ignore the instructions and get overtime. If you get instructions and the instructions are to practice law, and you're a licensed lawyer, you are practicing law exempt from overtime.

THE COURT: Is there any factual dispute about which instructions he was given?

MR. GREENWALD: No, your Honor. There is absolutely --

THE COURT: So the oral instructions that plaintiff is relying on, how do you analyze those?

MR. GREENWALD: the oral instructions -- Mr. Kutscher's testimony is clear and unrebutted that he provided oral instructions consistent with Exhibit Q at the initial training, and that the instructions were consistent throughout.

Plaintiff claims that there was some conversation he had with some other first-level reviewer that he should just mark -- and it's not even clear what he was told or how they differ from the instructions, but there is no dispute as to what Quinn Emanuel asked the first-level reviewers to do. So we submit that there is no dispute.

And I don't know what instructions there -- they had the opportunity, they could have taken depositions -- they could have taken evidence from any other first-level reviewer to find out -- I believe we provided the names of all the first-level reviewers, all the second-level reviewers. There is no evidence in the case about what anyone else had been told anything other than the written instructions and the oral instructions that are consistent with the written instructions. And Mr. Henig himself referred to Exhibit Q as his bible or a page in Exhibit Q as his bible. He had these written instructions. They were written in there the entire time, and there is simply no dispute other than this claim of some general conversation with another first-level reviewer that he was told anything else.

THE COURT: Do you want to respond, Mr. Kirschenbaum?

MR. KIRSCHENBAUM: Very briefly, your Honor.

Firstly, defendant did not allow us to take the discovery of other reviewers. I'm at a loss now, but I think it was either your Honor or Magistrate Judge Fox that in fact precluded us from taking the discovery of other reviewers. It's not that we didn't seek it. We very much did want it.

With respect to Mr. Greenwald's assertion that Mr. Kutscher's representation with respect to what happened at the oral session is unrebutted is just simply not true. To be clear, Mr. Greenwald did not ask Mr. Henig at his deposition specifically how was the job described to you at your oral presentation. In fact, Mr. Henig testified clearly in his declaration, and would have testified at deposition in fact, that the substantive training consisted almost entirely of oral instructions regarding when we should mark documents as responsive, non-responsive, attorney-client privilege or product privileged.

And then he continued and explains that it was explained to him at this session that a document with the search terms is responsive; without the search terms is not responsive. Similarly, with respect to privilege from an attorney to a client is privileged unless there is an individual on the chain who is not an attorney.

So, Mr. Henig explicitly refutes what the instructions were. Defendants say the instructions are this very broad group of things which include the oral training and all of the written materials which Mr. Henig was told to digest.

Mr. Henig says that with respect to the time he trained and explicit representations that were made to him, the job duties were what were told to him at the oral presentation and that is in fact what he did.

MR. GREENWALD: Even Mr. Henig's self-serving, last-minute declaration says: "If one of those terms or names was present in a document, then Quinn Emanuel almost certainly deemed the document." Even Mr. Henig can't say he was told to do it one way or the other. "Almost certainly" means he's conceded he had to look at the document and exercise judgment. Those were the oral instructions that are consistent with the written instructions. There is simply no dispute here, your Honor.

THE COURT: Thank you all.

Unless I hear any objection, consistent with my ruling at the start, I am going to ask the court reporter to redact page 30 lines 22 to 24 that mentioned the nature of the underlying case and the judge assigned.

Is everyone OK with that?

MR. GREENWALD: Yes, your Honor.

MR. KIRSCHENBAUM: Fine with me, your Honor.

THE COURT: I will take this under advisement.

Thank you all. Have a nice afternoon.

(Adjourned)